RECENT CASES.

AGENCY — STATUS OF ARCHITECT. — The plaintiff was employed by the defendant to prepare plans for a house. The defendant told him what he wanted, and that the cost should not exceed $2,500. The plaintiff furnished the plans, but the cost was too large. *Held*, error to instruct that, if the plaintiff accepted the restriction as to cost, he must make the plans accordingly before he could recover any pay. *Coombs* v. *Beede*, 36 Atl. Rep. 104 (Me.).

The court rest their opinion on the ground that the instruction is misleading, as it does not make allowance for the good faith of the architect and the chance of miscalculation inherent in making the plans. The facts of the case indicate that the architect was not a contractor, but merely an agent, and as such he was bound only to use his skill in performing his agency according to the instructions given him. The case is in line with the responsibility of a lawyer or a physician.

BILLS AND NOTES — CHECK PAYABLE TO FICTITIOUS PAYEE. — The plaintiff drew a check payable to a non-existing person, his clerk having told him that he was indebted to such person. The clerk then indorsed it to the defendant, a *bona fide* purchaser for value, using the fictitious name. The defendant received payment from the plaintiff's bank, and the plaintiff seeks to recover the amount. *Held*, the check was payable to bearer, and the defendant is entitled to keep the proceeds. *Clutton* v. *Attenborough*, 13 *The Times* L. R. 114.

The case rests ultimately on the construction of the clause of the Bills of Exchange Act, which declares that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." At the same time it seems an unfortunate construction to disregard the intention of the drawer of the check as to who shall be the payee. In the principal case the drawer never intended his clerk to get the money, while in the case of *Bank of England* v. *Vagliano*, [1891] A. C. 107, which the court regard as conclusive of the present case, it was the clerk who was the drawer of the bill and his employer the acceptor. Clearly in that case the drawer meant the bill to be payable to himself by the fictitious name. The construction adopted is at variance with the generally received doctrine that where X gets goods from the owner, either falsely representing that they are for A, or representing that he himself is A, a *bona fide* transferee of X gets no title. *Cundy* v. *Lindsay*, L. R. 3 A. C. 459; *Hardman* v. *Booth*, 32 L. J. Exch. 105; *Hentz* v. *Miller*, 94 N. Y. 64; *Barker* v. *Dinsmore*, 72 Pa. St. 427. The point in the principal case has been decided in favor of the drawer in New York, under a substantially similar statute. *Shipman* v. *Bank*, 126 N. Y. 318.

BILLS AND NOTES — TRANSFER AFTER MATURITY — NOTICE OF EQUITIES. — *Held*, where one, to whom notes payable to bearer have been delivered without indorsement, for safe keeping only, transfers them after maturity as his own, for a valuable consideration, his transferee is charged with notice as against the owner, that the transferrer held the notes merely as depositary. *Quimby* v. *Stoddard*, 35 Atl. Rep. 1106 (N. H.).

The decision is in line with the authorities, but it is thought that on principle a different result should have been reached. There is a clear distinction between the transferee after maturity from a holder against whom the parties to the note had some defence, and the transferee after maturity from a trustee. The former is chargeable with notice, because possession after maturity tends directly to show that the holder is unable to collect; but it does not in any way tend to show that, if the holder did collect, another would be entitled as *cestui*. This being so, the decision is inconsistent with the rule that the purchaser of trust property, without notice, takes it freed from the trust.

CARRIERS — EXPRESS PROVISION LIMITING LIABILITY. — The defendant inserted an express provision in a contract of carriage, that he would not be liable for a sum exceeding an agreed valuation of $100. *Held*, the provision was valid, although the jury found that the actual value of the goods was $250. *Loeser* v. *Chicago, M., & St. P. Ry. Co.*, 69 N. W. Rep. 372 (Wis.).

The decision places Wisconsin in line with the great weight of authority. *Hart* v. *R. R.*, 112 U. S. 331; *Squire* v. *R. R.*, 98 Mass. 239; *Belger* v. *Drismore*, 51 N. Y. 166; *Oppenheimer* v. *U. S. Ex. Co.*, 69 Ill. 62; *Elkins* v. *Transportation Co.*, 81 Pa. St. 315; *R. R.* v. *Henlein*, 52 Ala. 606; *Harvey* v. *R. R.*, 74 Mo. 538. But see, *contra*, *Ex. Co.* v. *Moore*, 39 Miss. 822; *U. S. Ex. Co.* v. *Bachman*, 28 Ohio St. 144; *R. R.* v. *Simpson*, 30 Kan. 645; *Moulton* v. *R. R.*, 31 Minn. 85. The reason also for the rule in the principal case is sound. A carrier may charge more for carrying a costly article than one

of less value, because his risk is greater. That he might also limit his liability by an express agreement as to its value, for the purpose of carrying at a smaller rate, would seem to be but a corollary of the former proposition, and no more against public policy.

CONFLICT OF LAWS — APPLICATION OF STATE STATUTE OF LIMITATIONS TO FEDERAL STATUTES. — *Held*, that the right of a receiver of an insolvent national bank to enforce the liability of stockholders, though created by United States statute, is barred by the running of a State statute of limitations. *Thompson* v. *German Ins. Co.*, 76 Fed. Rep. 892.

The court rests its decision, without much discussion, upon the case of *Campbell* v. *Haverhill*, 155 U. S. 610. Prior to that decision there was some conflict of authority. *Hayden* v. *Oriental Mills*, 15 Fed. Rep. 605, *accord*; *Brichell* v. *Hartford*, 49 Fed. Rep. 372, *contra*. That the question has been justly settled seems clear, for the fact that Congress has created a new right should not operate so as to clear it of the defences to which a defendant in ordinary cases is entitled.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAW. — An ordinance provided that no further interments should be made in the city of San Francisco, except by those who already owned lots purchased for that purpose. *Held*, unconstitutional. Such burials may be wholly prohibited, but, "while they are permitted within a district, the privilege cannot be limited to one class of citizens." *Ex parte Bohen*, 47 Pac. Rep. 55 (Cal.).

The court thus ignores the fundamental proposition that special legislation is not necessarily unequal legislation. See *Barbier* v. *Conolly*, 113 U. S. 27. The ordinance here appears to provide most wisely for the gradual doing away with burials in the city, without causing great injury to those who have already invested their money in cemetery lots. But if this were not so, the measure would not be unconstitutional unless the legislature has acted arbitrarily. The case is an extreme example of the well intentioned officiousness of a court in taking upon itself the responsibilities of government.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — A State statute provided that no liquors containing alcohol should be bought of any one except county dispensers; that the State commissioner, who had authority to supply the county dispensers, should purchase liquors for this purpose, preferring in his purchases home producers to those of other States; and that only such liquors should be furnished to the dispensers for general sale as had first been examined by the State chemist and pronounced pure. *Held*, that the law was an unconstitutional interference with interstate commerce. *Scott* v. *Donald*, 17 Sup. Ct. Rep. 265. See NOTES.

CONSTITUTIONAL LAW — STATE REGULATION OF TOLLS ON TURNPIKE ROADS. — In 1890, the Kentucky legislature passed a statute which provided that a certain turnpike corporation should charge no tolls in excess of those prescribed by the statute. This act of 1890 was disregarded by the turnpike company, and a bill was filed to compel it to respect the provisions of the act. The defendant alleged that, if the statutory rates of toll were enforced, its receipts would shrink to such an extent that it could neither maintain its road in a fit condition for public travel, nor pay any dividends to its stockholders. *Held*, that the act of the Kentucky legislature amounted to depriving the defendant of property without due process of law, and for that reason was unconstitutional. *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 17 Sup. Ct. Rep. 198.

Previous to the above case, the important question involved had been thoroughly discussed only in the case of *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 362. That case agrees substantially with the present one, and the two, taken together, seem to lay down the following proposition. Where a State legislature, or a commission appointed by a State legislature, fixes such a schedule of charges that those in that public business to which the schedule applies are unable, without loss to themselves, to perform their duties to the public and to their stockholders, then the action of the State amounts to depriving persons of property without due process of law; provided (and this is important) that the inability to perform public and private duties is caused by the action of the State, and is not attributable to other and wholly external causes, such as bad times, bad business management, etc. The above proposition seems to contain a sensible rule for answering the question as to whether a State has or has not acted arbitrarily. It is to be noticed, first, that inability to pay dividends will not of itself be a ground for complaining against a State's action; and, secondly, that it must be clear that there are no external causes which are making rates, which otherwise would be reasonable statutory provisions, appear unreasonable and insufficient.

CONSTITUTIONAL LAW — TAKING PROPERTY WITHOUT DUE PROCESS OF LAW. — A Nebraska statute provided that it should be unlawful for any common carrier to give any preference or advantage to, or to subject to any prejudice or disadvantage, any particular person, corporation, etc., in any respect whatsoever. The statute also created a board of transportation for the purpose of enforcing the above provision. The appellant had granted to two private firms the privilege of erecting elevators upon its right of way at a certain station. A number of private individuals petitioned this board of arbitration to give them the right to erect an elevator on the appellant's property, alleging that the two elevators then in existence did not afford sufficient accommodation, and had combined to raise prices. The board made an order in accordance with the prayer of the petition. *Held*, this order was unconstitutional, in that it deprived the appellant of property without due process of law. *Missouri Pac. Ry. Co.* v. *Nebraska*, 17 Sup. Ct. Rep. 130.

This decision reverses the judgment of the Supreme Court of Nebraska, given in 29 Neb. 550. The case seems clear. No question is raised as to the power of the Legislature to compel the appellant to maintain such elevators as are necessary for the accommodation of the public, nor as to its power to exercise a general control over the conduct of appellant's business. On the contrary, the case presents an attempt on the part of the State to compel the railroad to give over its property to a number of private individuals. Admitting that the railroad holds its property for the use of the public, this act of the State deprives it of private property in order that private persons may be benefited. This cannot be considered due process of law. See *Wilkinson* v. *Leland*, 2 Pet. 627; *Davidson* v. *New Orleans*, 96 U. S. 97. As appellant's property here was not to be taken for any public purpose, no question of eminent domain arises, and consequently it would seem to make no difference in the present case whether or not appellant was to be given compensation for the loss of its property.

CONSTITUTIONAL LAW — TRIAL BY EIGHT JURORS. — The Constitution of Utah declares that a jury shall consist of eight jurors. *Held*, that this is not a violation of the Fourteenth Amendment. *State* v. *Bates*, 47 Pac. Rep. 78 (Utah). See NOTES.

CONTRACTS — DAMAGES FOR BREACH OF COVENANT TO CONVEY. — Defendant contracted to convey to plaintiff unimproved land, with warranty of title. Before conveyance was to be made, plaintiff erected buildings on the land, at his own instance. In an action on the contract to recover damages for failure to convey, the defendant's title having proved defective, *held*, that the value of the buildings could not be recovered. *Gebbert* v. *Congregation of the Sons of Abraham*, 35 Atl. Rep. 1121 (N. J.).

This case is good law. The covenant here was simply to convey the land as it then was, and if a purchaser thinks proper to incur expenses, at his own instance, before title passes, he does so at his risk. *Smith* v. *Smith*, 28 N. J. L. 208; *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L. R. 7 H. L. 158. In an action on a warranty for eviction, damages are in general confined to the amount of purchase money. One cannot recover for improvements, nor increased value of land; and if no money has been paid for the land, only nominal damages are allowed. *Pitcher* v. *Livingston*, 4 Johns. 1; *Morris* v. *Rowan*, 17 N. J. L. 304. There is no reason why a different rule should be made in the principal case, where the defendant is unable to convey owing to a defect in the title. *Flureau* v. *Thornhill*, and *Bain* v. *Fothergill*, *supra*. Of course, where there is fraud or deceit on the part of the covenantor, the covenantee has his proper remedy, — an action for deceit.

CONTRACTS — STATUTE OF FRAUDS — ORAL AGREEMENT A DEFENCE TO BILL IN EQUITY. — Plaintiff and defendant, railroad companies, each being desirous of crossing the other's tracks at different points, entered into a verbal agreement for such mutual rights of crossing. In pursuance thereof, plaintiff crossed defendant's tracks, but filed a bill to enjoin defendant from crossing plaintiff's tracks at the point agreed upon. *Held*, that although the contract was void under the statute of frauds, still it might be proved in resistance to a bill for an injunction. *Denver, &c. R. R. Co.* v. *Ristine*, 77 Fed. Rep. 58.

That a contract within the statute of frauds may be set up as a defence in equity seems well established; Browne, Stat. of Frauds, § 129. Where the action is at law, however, a difference of opinion exists. *King* v. *Welcome*, 5 Gray, 41, is to the effect that a contract of hiring, within the statute of frauds, cannot be proved to resist a *quantum meruit* by a plaintiff who has left within the period of service provided for by the contract. The court in that case conceded that, if the contract had been an oral one for the sale of land, and the money had been paid by the vendee, the vendor could set up his willingness to go on with the contract against a suit to recover back the money. It is submitted that no sound distinction can be drawn between the two classes of cases, and that the decision in *Philbrook* v. *Belknap*, 6 Vt. 383, which admitted such evidence of a verbal hiring, represents the better law.

CONTRACTS — STATUTE OF FRAUDS. — *Held*, that a verbal contract to maintain a switch for plaintiff's benefit for shipping purposes, "so long as he may need it," is not within the Statute of Frauds as being an "agreement not to be performed within the space of one year from the making thereof." *Warner* v. *Texas & P. R. R. Co.*, 17 Sup. Ct. Rep. 147.

It seems rather strange that this point has not been definitely settled in the Supreme Court before, when the law in England appears to have been so since the time of Lord Holt. *Peter* v. *Compton*, Skin. 353. The general rule appears to be, that where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply. *McGregor* v. *McGregor*, 21 Q. B. D. 424. But a contract for a term specified of more than a year, determinable by notice within a year, is held to come within the rule. *Birch* v. *Liverpool*, 9 B. & C. 392. As the question is so largely one of construction, it may naturally be expected that the various states have not adopted a uniform rule. However, the cases collected in Browne, Stat. of Frauds, § 272 *et seq.*, show a marked tendency to follow the English doctrine. The question is whether the contract, according to the reasonable interpretation of its terms, requires that it should not be performed within a year.

CONTRACTS — USURY — LIABILITY TERMINATED BY BORROWER'S DEATH. — The defendant borrowed money of the plaintiff to be repaid in monthly instalments, but in case of the defendant's death the unpaid portion to be released. At the same time the plaintiff obtained from an insurance company a policy on defendant's life, which fully indemnified him from any possibility of loss in case of defendant's death before full payment. The amount to be paid by the defendant was largely in excess of the principal of the loan, with the highest interest allowed by law and the cost of the insurance paid for by the plaintiff. *Held*, that the contract was void, as a cover for usury. *Kansas & Texas Trust Co.* v. *Krumseig*, 77 Fed. Rep. 32.

This case is interesting as an illustration of the futile subterfuges resorted to by certain lenders in their attempts to evade the usury statutes. The plaintiffs contended that, as the defendant would be relieved of payments in case of death, there could be no question of usury. But the court rightly held that the contingency was a flimsy pretext. The real meaning of the contract was, that the borrower was to pay at a usurious rate if he lived, and if he died the lenders were to be indemnified by insurance nominally paid for by them, but in reality by the funds illegally secured from the borrower. The courts will not suffer the statute to be evaded by a mere colorable device.

CORPORATIONS — LIABILITY OF COUNTIES FOR DEFECTS IN HIGHWAYS. — *Held*, that a county is not liable for injury to land where a bridge erected by the county was built so negligently as to cause a stream to change its course. *Davies* v. *Ada County*, 47 Pac. Rep. 93 (Idaho).

The weight of authority is, that, while cities may be held liable for damages arising from negligence in the maintenance of public ways, counties are exempt. The reason for the distinction is not clear. Cities, to be sure, partake of the nature of private corporations, and are often liable as such; but they are ordinarily not liable in the exercise of governmental functions. It is because a county exercises purely governmental functions that it escapes liability, and when a city engages in exactly the same work it should be exempt for the same reasons. The alternative would seem to be to make both liable. 2 Dillon, Munic. Corp., 4th ed., § 998.

CORPORATIONS. — UNCONSTITUTIONAL ENABLING ACT. — By *quo warranto* proceedings, a general statute for the formation of boroughs was declared unconstitutional. *Held*, nevertheless, that a borough already incorporated under this statute could continue to act as a *de facto* corporation until direct proceedings were taken against it. *Coast Co.* v. *Spring Lake*, 36 Atl. Rep. 21 (N. J.).

To enable a corporation to exist *de facto*, there must be a *bona fide* attempt to organize under an existing law, and so it is still an open question whether such a corporation can be organized under an invalid one. From the practical standpoint, the difficulty of determining the question of constitutionality, and the confusion occasioned by unsettling business transactions entered into *bona fide*, afford a strong argument for admitting its *de facto* existence. Such reasoning has prevailed in the New Jersey court, but even so the basis of this doctrine is the mistake of the parties. Acts which were never authorized are allowed to stand because it was supposed that the authority had been given. According to the principal case no incorporation would be valid if attempted with knowledge of the *quo warranto* proceedings of the Attorney General, for the courts do not wish to encourage acts which are known to be forbidden by the Constitution of the State. This same reasoning would seem to apply equally to

transactions after incorporation, if all the parties concerned knew that the law from which the corporation claimed its existence had been held null and void. The court, in reaching a contrary conclusion, were much influenced by the inconvenience of leaving a borough without a government.

CRIMINAL LAW — APPEAL — ABATEMENT BY DEATH. — *Held*, when one appeals from a criminal conviction and dies before the appeal is prosecuted, his personal representative cannot carry on the appeal, though there is a judgment for costs which binds the estate of the deceased. *State* v. *Martin*, 47 Pac. Rep. 196 (Ore.).

At common law, an appeal could be brought by the representative to reverse an attainder of treason or felony, in order to remove the corruption of blood and the forfeiture of estate, (*Marsh's Case*, 1 Leon. 325, and *Williams* v. *Williams*, Cro. Eliz. 557,) and as the latter are both abolished, the court consider that the common law reason for such appeals no longer exists. But a judgment for costs binding the estate seems, as far as it goes, to give the representative an exactly similar interest. The case, however, is in *accord*, both in decision and reasoning, with *O'Sullivan* v. *The People*, 144 Ill. 604, regarding the judgment for costs as a mere incident to the real question.

EQUITY — IMPROVEMENTS MADE UNDER MISTAKE AS TO TITLE. — Defendant had improved land by building thereon, supposing he had acquired title to the land under foreclosure proceedings. In fact, the defendant had not acquired an indefeasible title, having failed, through ignorance of a later recorded mortgage, to make the second mortgagee a party to the foreclosure suit. *Held*, the second mortgagee was entitled to redeem only on condition of reimbursing the defendant the value of the betterments made before actual knowledge of the second mortgage was brought home to him. *Ensign* v. *Batterson*, 36 Atl. Rep. 51 (Conn.).

This case is but an application of the maxim that he who seeks equity must do equity. Doing equity under these circumstances consists in paying the defendant the value of improvements made by him under a *bona fide* mistake as to title. Keener, Quasi Contracts, 377. It is interesting to note this case as one in which the constructive knowledge which one has of all recorded interests has not the same effect as actual notice of such interest.

EQUITY — SETTING ASIDE A VOLUNTARY SETTLEMENT. — *Held*, that a voluntary family settlement will be set aside, when it appears that the grantor did not intend it to be irrevocable; but after the death of the settlor, the party seeking to set it aside must show himself entitled in equity to the benefit of the settlor's right. *Richards* v. *Reeves*, 45 N. E. Rep. 624 (Ind.). See NOTES.

EQUITY — SUBROGATION. — Where land was sold to satisfy a valid lien for a drainage assessment, but the purchaser failed to get a good title, *held*, that the State's lien for the drainage assessment will be revived in equity for the benefit of the purchaser. *Reed* v. *Kalfsbeck*, 45 N. E. Rep. 476 (Ind.).

An obligation satisfied at law will be revived in equity for the benefit of one who has extinguished the obligation at law in consequence of compulsion, or to protect a threatened business interest. Thus, a judgment creditor who purchases property sold to satisfy his judgment, but fails to get title, may revive the satisfied judgment in equity. *McGhee* v. *Ellis*, 4 Litt. 244. In many cases, a stranger purchasing at an execution sale under a valid judgment has been given the same aid in equity. This extension of the doctrine of subrogation meets with the approval of Mr. Freeman. Freeman on Executions, 2d ed., § 352. All the reasons urged for making this extension of the doctrine of subrogation are present in the principal case.

EVIDENCE — DIRECTION OF VERDICT. — *Held*, reversible error for a court to direct a verdict for defendant, though the evidence so preponderated in its favor that, had the jury found for the plaintiff, the court would have set aside the verdict as against the weight of evidence. *Luhrs* v. *Brooklyn Heights R. R. Co.*, 42 N. Y. Supp. 606.

The decision is unsatisfactory. It is generally said that the test of the right to direct a verdict is whether the court would be bound to set a verdict aside as against evidence if rendered against the party in whose favor it is directed. The court attempts, in the principal case, to restrict the meaning of the phrase "against evidence" to cases where the verdict is without evidence to support it. It is hard to see why it should not apply equally well to cases where reasonable men could not differ as to the preponderance of the evidence. As is said in *North Penn. R. R. Co.* v. *Commercial Bank*, 123 U. S. 727, "It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

MUNICIPAL CORPORATIONS — ILLEGAL ACTIONS OF PUBLIC OFFICIALS — RIGHT OF INDIVIDUAL TO INTERFERE. — *Held*, that a resident taxpayer and voter may obtain

a writ of *certiorari* to test the legality of an act by the board of trustees of a township in uniting highway districts. *Dunham* v. *Cox*, 69 N. W. Rep. 436 (Iowa).

It is the general doctrine that a taxpayer may be recognized in equity to prevent misappropriation of public funds (2 Dillon, Munic. Corp., 4th ed., § 922), and it is not confined to cases of cities. In New York, however, it is held that the public alone can complain. *Roosevelt* v. *Draper*, 23 N. Y. 318. And see *Croft* v. *Jackson Co.*, 5 Kan. 518. If the taxpayer can interfere in those cases, there would appear to be no reason why he cannot under circumstances like those in the principal case. And if he is recognized in equity, it would seem that he should be allowed to proceed by way of *certiorari*. The case follows *Collins* v. *Davis*, 57 Iowa, 256.

PERSONS — DIVORCE — CONNIVANCE. — The plaintiff, suspecting her husband of infidelity, and being desirous of obtaining a divorce, employed detectives to procure the necessary evidence. The detectives engaged a lewd woman to lure the husband into an act of adultery, and afterwards gave such information to the plaintiff that she was able to confront her husband in a compromising situation with this woman. *Held*, although the plaintiff did not authorize the employment of the woman, the facts are such as to warrant an inference of connivance sufficient to bar the plaintiff's right to a divorce. *Dennis* v. *Dennis*, 36 Atl. Rep. 34 (Conn.).

The question involved in the above decision is largely one of fact, and the court simply sustains the finding of a single judge sitting without a jury. The case would be unimportant were it not for the proposition which the court lays down, to the effect that where a husband or wife hires a third person to procure evidence upon which to found an action for divorce, an inference of connivance will arise whenever the guilty acts are brought about by means of this third person. It is not uncommon for detectives to be employed as in the principal case, and the decision is apt to be followed as a precedent. *Gower* v. *Gower*, L. R. 2 P. & D. 428, is an authority in point.

PERSONS — LIABILITY OF FATHER TO SUPPORT INFANT CHILD. — During the pendency of a petition for divorce the court issued a temporary injunction against the defendant, restraining him from interfering with the wife's custody of the child. While the injunction was in force, the plaintiff furnished the child with necessaries at the request of the mother. *Held*, the father is liable for necessaries so furnished. *Shields* v. *O'Reilly*, 36 Atl. Rep. 49 (Conn.).

Assuming the legal obligation of the father to support the child, the decision seems right. The misconduct which deprives him of the right of custody will not excuse him from the liability to support. Or even assuming that he owes no legal duty to the child, the support of the child is one of the necessaries of the wife for which the husband is liable. 2 Bish. Mar., Div., & Sep., § 1223. *Bazeley* v. *Forder*, L. R. 3 Q. B. 559. *Pretzinger* v. *Pretzinger*, 45 Ohio St. 452. Many decisions apparently opposed to the principal case go on the ground that where a final decree of divorce is granted, and the wife is given the custody of the children, liability of the husband for the support of the children will be enforced only by granting to the wife an allowance for that purpose under the divorce proceedings. *Brow* v. *Brightman*, 136 Mass. 187; *Hall* v. *Green*, 32 Atl. Rep. 796 (Me.); *Brown* v. *Smith*, 33 Atl. Rep. 466 (R. I.).

PROPERTY — DEEDS — FRAUDULENT DELIVERY BY ESCROWEE. — A agreed to sell land to B, and placed the deed in C's hands to be delivered to B on payment of the purchase price. C delivered the deed before payment, and B mortgaged the land to D, who had no notice. *Held*, that A is estopped to set up his claim against a mortgagee who in good faith relied on the deed. *Shurtz* v. *Colvin*, 45 N. E. Rep. 527 (Ohio).

The essential point is the effect of the wrongful delivery on the legal title. On this there is great conflict of authority. Several courts hold such a deed absolutely void; *Everts* v. *Agnes*, 6 Wis. 453; but the weight of authority is in agreement with the principal case that the legal title passes to the grantee, subject to the grantor's equitable right, which, however, he cannot set up against one who has relied on the deed. *Blight* v. *Schenck*, 10 Pa. St. 285; *Quick* v. *Milligan*, 108 Ind. 419.

PROPERTY — PERCOLATING WATER. — A appropriated the water of a stream which was fed by percolation from a spring on B's land. B enlarged the basin of the spring and diverted the water. *Held*, that B may be enjoined from taking water from the spring. *Bruening* v. *Dorr*, 47 Pac. Rep. 290 (Cal.).

The court recognizes the general rule that percolating water is not the subject of appropriation. *Ry. Co.* v. *Dufour*, 95 Cal. 615. But it agrees with the view of *Strait* v. *Brown*, 16 Nev. 317, that one who appropriates the waters of a stream acquires a property right in the springs which feed it, even though the water reaches it by percolation. While it is doubtful if such a rule would be applied to cases of natural rights, it seems to be a reasonable application of the Western doctrine of appropriation.

PROPERTY — WILLS — GENERAL AND SPECIFIC LEGACIES. — The testator bequeathed to several legatees in different amounts shares of stock in a certain corporation, using the language, "Shares of the stock of the X corporation now owned by me, and standing in my name on the books." These bequests amounted to 2,000 shares. When the will was made the testator owned 3,200 shares. At his death all but 200 of these had been sold. *Held*, that the legacies were not specific, and therefore not adeemed. *Mahoney* v. *Holt*, 36 Atl. Rep. 1 (R. I.).

Though formerly a matter of some doubt, it is now everywhere admitted that, if a legacy is specific, it is subject to ademption during the testator's life, and this utterly regardless of the testator's intention. *In re Bridle*, 4 C. P. D. 336. But the difficult question in the principal case is one of construction, in determining whether the words of the will are such as to constitute a specific legacy. Upon this point it would seem that the court might have reached a different conclusion. The language of the testator appears to indicate pretty clearly that he intended the shares to be taken from the number which he owned at the time of making the will; and the difficulty felt by the court, that any one lot of shares could not be identified and distinguished from other shares contained in similar bequests, has not been considered an insuperable objection to holding legacies of this kind specific. Williams on Executors, 9th ed., 1027, 1028. At the same time, the tendency has always been toward a construction in favor of regarding legacies as general rather than specific in doubtful cases.

STATUTE OF LIMITATIONS — ACCRUAL OF CAUSE OF ACTION. — *Held*, a cause of action against an abstracter of titles for giving a wrong certificate of title accrues at the date of the delivery, and not at the time the negligence is discovered or consequential damages arise, and action is barred by a three-years statute of limitations, though the plaintiff was ignorant during that time that any mistake had been made. *Provident Loan Trust Co.* v. *Walcott*, 47 Pac. Rep. 8 (Kan.).

There is hardship in this case, but an analysis of the grounds of the decision proves its correctness in point of legal principle. The cause of action is the breach of the contract to provide a careful abstract. That breach occurs when a negligently prepared abstract is delivered. From that moment the statute begins to run, and lack of knowledge on the part of the plaintiff cannot affect its operation. 2 Greenleaf on Evidence, § 435.

SURETYSHIP — GUARANTY OF NOTE — BURDEN OF PROOF. — Defendant transferred and guaranteed to plaintiff a note made in Wisconsin, in which State the maker resided at the time of the execution and of the guaranty. Before the maturity of the note, the maker removed from the State. Plaintiff sued on the guaranty. *Held*, that the burden was on the defendant to show that the maker had property in Wisconsin out of which the note could be collected, and not upon the plaintiff to prove that he had no such property within the State. *Fall* v. *Youmans*, 69 N. W. Rep. 697 (Minn.).

In *White* v. *Case*, 13 Wend. 543, it was held, under similar circumstances, that, though the plaintiff was not bound to pursue the maker when the latter had left the State, still it was incumbent on the plaintiff to prove that he had exhausted the remedy afforded by the laws of the State before he could recover from the guarantor. As the holder must show that the debt is not collectible from the maker before he can recover from the guarantor for collection (*Sylvester* v. *Downer*, 18 Vt. 32), the burden of proving that the maker has no assets within the jurisdiction is upon him, and the mere fact that the maker has left the State would not seem sufficient to relieve him of such burden. The doctrine of the majority of courts, that although the pursuit of an action to judgment, with a return of *nulla bona*, is one of the extreme tests of due diligence, yet such diligence may be satisfied by other means, as proof of insolvency (*Camden* v. *Doremus*, 3 How. 515) would seem to apply equally whether the maker is within or without the jurisdiction, and would relieve the plaintiff from proving a resort to service by publication in all cases where the maker had left the State.

SURETYSHIP — RELEASE BY EXTENSION OF TIME. — *Held*, that an agreement by the holder of a note to extend the time of payment indefinitely, though based on valuable consideration, does not discharge the surety. *Bunn* v. *Commercial Bank*, 26 S. E. Rep. 63 (Ga.).

When bankruptcy is imminent it may sometimes happen that a failure to demand immediate payment will involve the loss of the debt. Therefore, if the creditor does not press his claim, it is the right of the surety to discharge the obligation and come down at once on the debtor. This is admitted by the court, and that an agreement to forbear for a definite time would discharge the surety. It would seem that he is equally deprived of his rights by an extension for an indefinite time, i. e. a reasonable time. See *Oldershaw* v. *King*, 2 H. & N. 517; *Bank* v. *Parker*, 130 N. Y. 415; *Howe* v. *Taggart*, 133 Mass. 214. The doctrine that a surety is discharged by an extension of

credit is perhaps a hard one, and frowned upon by the courts; but there is no logical reason to justify an exception to the rule in the principal case.

TORTS — PRIVATE ACTION FOR A PUBLIC NUISANCE. — By reason of defendant's wrongful obstruction of a navigable river, plaintiff was compelled to let his steamboat lie idle above the obstruction. *Held*, plaintiff cannot maintain an action against defendant, since the wrong to him differed in degree only, and not in kind, from that sustained by the public at large. *Jones* v. *Ry. Co.*, 47 Pac. Rep. 226 (Wash.).

It cannot now be questioned that one who suffers a particular damage as a result of a public nuisance may recover his damages in an action at law. Pollock on Torts, 326. It is pretty clear that one who suffers a bodily injury or a physical invasion of corporeal property has sustained a particular damage within the meaning of this rule. But the authorities are most unsatisfactory as to when, if at all, one who suffers more loss than the public at large by reason of not being permitted to use a public highway may maintain an action at law. Cf. *Stetson* v. *Faxon*, 19 Pick. 147, with *Blackwell* v. *R. R. Co.*, 122 Mass. 1; *Fritz* v. *Hobson*, 14 Ch. D. 490, with *Rickett* v. *Metropolitan Ry. Co.*, 2 H. L. Cas. 175. *Contra* to the principal case, *Dudley* v. *Kennedy*, 63 Me. 465; *Knowles* v. *R. R. Co.*, 175 Pa. St. 623.

TRUSTS — BEQUEST ON SECRET UNDERSTANDING. — A testatrix made an absolute bequest of certain property to the executor who had drawn up her will, in case certain declared trusts in previous sections of the will should be held void. *Held*, that the executor's knowledge of the contents of the will implied a secret understanding that he would take bequest on trust; and that as the trust was invalid the next of kin should take. *Edson* v. *Bartow*, 41 N. Y. Supp. 723. (See NOTES.)

REVIEW.

THE LAW OF RECEIVERS. By Charles Fisk Beach, Jr. Second Edition, with Additions and Changes, by William A. Alderson. New York: Baker, Voorhis & Co. 1897. pp. lxx, 950.

This is a considerably enlarged edition of Mr. Beach's well known work on Receivers, containing all the additions and alterations necessary in a subject which has been so much developed in this country since the time when the original edition was published. It appears to be a very complete treatise on every portion of the law relating to this peculiarly modern and American piece of judicial machinery. We say peculiarly modern and American, because the employment of receivers, though in its origin, perhaps, as old as equity, has only in this country, and within less than half a century, become a topic of such importance as to deserve extended and separate consideration. Mr. Alderson seems to have done the work of collecting the later authorities with great thoroughness, and some of the sections which he has added contain remarkably far-sighted discussions of questions of present importance; but his style is decidedly careless compared with that of Mr. Beach. We should be glad to learn how to parse certain of his sentences (for examples see p. 72, line 11, and p. 881, line 8). The printer is perhaps responsible for these slips, as may be suspected from a sprinkling of misprints rather plentiful for a volume of such a good general appearance. On p. 697, at line 12, for instance, the important little word "not" seems to be lacking, and on p. 49 there are two misprints, one at line 15, and the other in note 2 at line 12. The book is well arranged, and contains a comprehensive index. R. G.